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ARTICLE

AN EFFORT TO ARTICULATE A CATHOLIC REALIST APPROACH TO ABORTION

SUSAN J. STABILE*

Our witness to the sanctity of life cannot diminish and our effort cannot cease. We must continue to enlist new vehicles of communication to highlight the grave moral evil inherent in abortion. We have to design effective and imaginative strategies to help people see that the choice for life is the most compassionate choice. And we have to speak with courtesy and clarity about why the protection of the unborn is a requirement of human rights and not their diminishment.¹

INTRODUCTION

The impulse to articulate a viable Christian realism proceeds from several premises. One is the reality that, although our ultimate end is beyond this world, we are in this world now and seek to make it a just world modeled on the Kingdom. (Christians pray in the Lord's Prayer, "Thy Kingdom come, thy will be done, *on earth* as it is in heaven." That is not a prescription to sit back and wait for eternal life.) A second is that the fallen nature of humanity means that the moral vision of Jesus is not fully

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1. Archbishop John R. Quinn, *The Public Duty of Bishops*, AMERICA, Aug. 31, 2009, at 18, 18.

achievable in this world. That is, conscious of the “social forces that shape and limit human possibilities,”² Christian Realism accepts that there must be a certain amount of compromise in human affairs. In the words of Australian Bishop Mark Coleridge, Catholic realism

moves—sometimes step by step, sometimes one step forward, two steps backward—towards the absolute which never ceases to be the lodestar of the journey. In other words, we need to keep one eye firmly fixed on what is . . . gloriously possible, within the plan of God, on the glory of the new Jerusalem, which means on the fullness of what the Church teaches.³

The primary purpose of this paper is to attempt to examine whether it is possible to articulate a Catholic realist approach to abortion that might help advance public debate on the issue.

What prompts this effort is the recognition, which seems to be increasingly shared by many, that we need to find some way to move the abortion debate forward by trying to find “common ground” between what have become, over time, very polarized positions on this issue. The term “common ground” is one that has been bandied about a lot in the months since the last presidential election, with respect to abortion and other issues, such as health care. I recognize that not everyone is convinced that everyone else who uses the term is, in fact, sincere about finding ground that is really common. Nonetheless, the reality is that we must find a way to move the discussion of abortion forward in a constructive way.

The abortion issue is a significant one on which to try to achieve common ground for at least three reasons. First, from the Catholic perspective, abortion is an intrinsic evil—an “abominable crime”⁴—that

2. ROBIN LOVIN, REINHOLD NIEBUHR AND CHRISTIAN REALISM 1 (1995).

3. Bishop Mark Coleridge, International Bioethics Symposium: Toward the New Jerusalem: Catholic Realism in the Public Domain 5 (June 27–30, 2005) http://www.cg.catholic.org.au/_uploads/rsfil/00042.pdf. Or, in the words of Lawrence Cunningham, “In the final analysis we can say that Catholic realism is an attempt to balance our involvement in the real and tactile world with a sense that there is something both beneath and beyond that world; that beneath and beyond is the presence of God.” LAWRENCE S. CUNNINGHAM, THE CATHOLIC FAITH: AN INTRODUCTION 121 (1987). David Brooks reported on a conversation he had with Obama that expressed the realist position this way:

Out of the blue I asked, “Have you ever read Reinhold Niebuhr?”

Obama’s tone changed. “I love him. He’s one of my favorite philosophers.”

So I asked, “What do you take away from him?”

“I take away,” Obama answered in a rush of words, “the compelling idea that there’s serious evil in the world, and hardship and pain. And we should be humble and modest in our belief we can eliminate those things. But we shouldn’t use that as an excuse for cynicism and inaction. I take away . . . the sense we have to make these efforts knowing they are hard, and not swinging from naïve idealism to bitter realism.”

David Brooks, Op-Ed., *Obama, Gospel and Verse*, N.Y. TIMES, April 26, 2007, http://select.nytimes.com/2007/04/26/opinion/26brooks.html?_r=1.

4. CATECHISM OF THE CATHOLIC CHURCH: MODIFICATIONS FROM THE EDITIO TYPICA Nos. 2271–2272 (2d ed., U.S. Catholic Conf. 1997) [hereinafter CATECHISM OF THE CATHOLIC

offends “against the human person and against God the Creator and Father”⁵ and that “distort[s] the true nature and dignity” of motherhood.⁶ The Catechism characterizes it as an “unchangeable” teaching that every “procured abortion” is a “moral evil.”⁷ As the opening quotation from Archbishop Quinn suggests, the Church cannot and will not diminish its efforts to witness to the sanctity of life.

The second is the incidence of abortion. The shocking reality is that about one-fifth of all pregnancies in the United States end in abortion and that almost one-half of all unintended pregnancies end in abortion.⁸ There are almost 1.3 million abortions in the United States every year.⁹ The United States has a higher abortion rate than most developed countries and a higher abortion rate than any Western European country.¹⁰ Whether one believes, as do Catholics, that what begins at conception is human life or only the potential for human life, the incidence should trouble us.

Finally, abortion is an issue that generates a lot of heat. Although we have an American public that increasingly shies away from the idea that abortion should be legal under all circumstances (including among those who label themselves pro-choice),¹¹ there are still both a significant number

CHURCH]; Pope: *Abortion ‘An Abominable Crime’*, CNN, Oct. 4, 1997, <http://www.cnn.com/WORLD/9710/04/brazil.pope/>; *Pope Greets 1.5 Million Faithful at Rio Mass*, CATHOLIC WORLD NEWS, Oct. 6, 1997, <http://www.catholicculture.org/news/features/index.cfm?recnum=5973>; *Pope Calls Abortion Shame of Humanity*, REUTERS, Oct. 5, 1997, <http://www.mosquionet.com/~prewett/abortionshameofhum.html>. See generally Pope Paul VI, *Pastoral Constitution on the Church in the Modern World - Gaudium Et Spes* ¶ 51 (Dec. 7, 1965), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html (“Therefore from the moment of its conception life must be guarded with the greatest care while abortion and infanticide are unspeakable crimes.”).

5. Pope John Paul II, *Letter to All the World’s Bishops on Combating Abortion and Euthanasia* (May 19, 1991), available at <http://www.catholicculture.org/culture/library/view.cfm?id=303&CFID=34735377&CFTOKEN=84362467>.

6. Pope John Paul II, Homily at Santa Clara, Jan. 22, 1998 (transcript available at <http://ordendemaltacuba.com/popesantaclara.aspx>); see also Lisa McDonald, *Feminism, Communism and Catholicism*, 304 GREEN LEFT WEEKLY, Feb. 4, 1998, available at <http://www.hartford-hwp.com/archives/43b/174.html>.

7. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, at No. 2271.

8. Guttmacher Institute, *Facts on Induced Abortion in the United States* (July 2008), http://www.guttmacher.org/pubs/fb_induced_abortion.html#1ref.

9. *Id.*

10. Gilda Sedgh et al., *Legal Abortion Worldwide: Incidence and Recent Trends*, 33 INT’L FAM. PLAN. PERS. 106, 108 (2007); Gilda Sedgh et al., *Induced Abortion: Estimated Rates and Trends Worldwide*, 370 THE LANCET 1338, 1338 (2007); Hannah Brown, *Abortion Round the World*, 335 BRIT. MED. J. 1018, 1019 (2007).

Pro-choice advocates argue that higher rates of pregnancy in the United States are the result of a higher incidence of unintended pregnancies. See GUTTMACHER INSTITUTE, *ABORTION IN CONTEXT: UNITED STATES AND WORLDWIDE 2* (1999), available at http://www.guttmacher.org/pubs/ib_0599.pdf.

11. Lydia Saad, *More Americans “Pro-Life” Than “Pro-Choice” for First Time*, GALLUP, May 15, 2009, available at <http://www.gallup.com/poll/118399/More-Americans-Pro-Life-Than->

of people who are opposed to any limit on a woman's right to choose¹² and a significant number who think that the legal system must prohibit abortion in all circumstances in the strongest possible terms.¹³ The abortion issue, therefore, is an extremely divisive one, and that divisiveness spills over into other areas as well, as we have seen in the current debate about health care reform.

I recognize that, from a Catholic perspective, there are differences in how we conceive the obligations of different actors in the legal and political system; the responsibilities within the system—and therefore the moral obligations of a Catholic judge,¹⁴ a Catholic legislator,¹⁵ a Catholic lawyer,¹⁶ and a Catholic citizen—may differ. However, even without delving into those differences, I think there is value in trying to explore what options exist for a political and legal system's treatment of abortion that might be consistent with a Catholic realist position.¹⁷

I. CONDITIONS REQUIRED FOR A CATHOLIC REALIST APPROACH TO ABORTION

“Catholic realism . . . acknowledges both the peril and the promise of the human condition, but it does not sacrifice the promise to the peril.”¹⁸ It attempts to steer a path between “unrealistic absolutism” and relativism, an approach that “in no way betrays the vision of the absolute, but which does not become an ideologically geared absolutism.”¹⁹ Catholic realism must

Pro-C%20choice-First-Time.aspx.

12. Results of a Pew survey show that 18 percent believe abortion should be legal in all cases; 46 percent in most cases. *Public Takes Conservative Turn on Gun Control, Abortion*, PEW RES. CENTER PEOPLE & PRESS, April 30, 2009, available at <http://people-press.org/report/513/public-takes-conservative-turn-on-gun-control-abortion>.

13. The Pew survey also indicates that 16 percent believe abortion should be illegal in all cases and 28 percent in most cases. *Id.* A 2007 survey conducted by Third Way found that 20 percent of respondents believed that “abortion is so wrong that people who perform or have an abortion should go to jail.” THIRD WAY, NATIONAL ABORTION SURVEY: WEIGHTED MASTER QUESTIONNAIRE 5 (2007).

14. See, e.g., Scott Idleman, *Private Conscience, Public Duties: The Unavoidable Conflicts Facing a Catholic Justice*, 4 U. ST. THOMAS L.J. 312 (2007).

15. See, e.g., Gregory C. Sisk & Charles L. Reid, Jr., *Abortion, Bishops, Eucharist, and Politicians: A Question of Communion*, 43 CATH. LAW. 255 (2004).

16. See e.g., Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635 (1997).

17. The discussion will of necessity at least obliquely address the antecedent question of whether Catholic realism is an oxymoron, that is, whether it is even valid from a Catholic perspective to promote a “realist” approach.

18. Joseph J. Fahey, *On Peace and War: The Compendium of the Social Doctrine of the Church*, AMERICA, Oct. 17, 2005, at 16, 16. Fahey suggests that, in the context of international relations, one can look to a time “when war will be abolished, when human rights will be universally respected and justice will characterize the relations between states.” He sees no inconsistency between idealism and realism, claiming that the opposite of idealism is not realism, but pessimism.

19. Coleridge, *supra* note 3, at 5.

include

a keen sense of political realities, of what is possible at this time and in this culture within the public domain, keeping in mind that almost always the question at issue in public debate is not so much whether particular practices are morally justifiable, but whether regulation of them is necessary in a humane society. This requires a moral sensitivity to assess to what extent we can tolerate evil in trying to achieve some good, by which I mean a limiting of the evil.²⁰

I think there are at least three key elements to calling a position on abortion a Catholic realist position. Let me here simply identify the three and briefly suggest reasons they might be challenging. Each of the three will figure in the discussion that follows in Section II.

1. Factual Accuracy

First, for an approach to law and policy to be labeled realist, it has to be based on accurate facts. This is true of any position one wishes to label a realist one and is not unique to a Catholic realist position; a realist philosophy requires a correspondence between belief and reality. Accordingly, factual accuracy is an important aspect of trying to articulate a Catholic realist position on abortion, which involves some very important factual questions relating both to the beginning of human life and to the efficacy and impact of various potential approaches to reduce abortions.

The question of when life begins is one on which there is wide, but not total agreement. Even among those who are pro-choice, there are many who accept that life begins at conception.²¹ However, some argue what begins at conception is only the potential for life or that, even if there is life at conception, it is not human life.²² Similarly, as the subsequent discussion will suggest, there is disagreement on factual questions relating to the efficacy of various means of reducing abortion, such as the availability of contraception, and to statistics concerning the effect of various legal changes on the incidence of abortion at various times.

Both of these categories of facts present challenges. If a realist position depends on adequate understanding and assessment of the relevant facts,

20. *Id.* at 6–7 (suggesting several other things Catholic realism involves, including “genuine dialogue with those who see differently than we do, with an effort to find a shared language, in particular about the human person”).

21. See, e.g., EILEEN L. MCDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996); Gregory Dolin, *A Defense of Embryonic Stem Cell Research*, 84 IND. L.J. 1203, 1206 (2009); Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFAIRS 47, 47 (1971). From a genetic and scientific standpoint, it is hard to dispute that what begins at conception is human life. *Planned Parenthood Minnesota v. Rounds*, 530 F.3d 724, 735–36 (8th Cir. 2008) (en banc).

22. Dolin, *supra* note 21, at 1206.

how do we address wildly disparate factual evidence? More challenging, how do we evaluate the factual evidence on both sides of the issue in an environment where neither the pro-choice nor the pro-life side of the debate believes the other side's statistics?²³ There has developed so much polarization over the issue of abortion that it is hard to get past the skepticism each side has toward the other and toward evidence produced by the other.

An additional complicating fact is that many of the claims about abortion are, in the words of one commentator, "fundamentally not empirical. They are founded on the inner logic of choice, and thus count at the least as tendencies to be watched for, even though they might not be noticeable if they were commonly drowned out by countervailing behavioral forces."²⁴ Claims founded on an "inner logic of choice" are much less capable of empirical verification.

2. Viability

Second, for an approach to be labeled realist, it has to be viable; it has to work. Again, viability is not unique to a *Catholic* realist position, but is true of anything that would call itself realist. A Catholic realist position seeks to support strategies that will achieve the desired goals.

As a first step, this requires clarity about what goal one is seeking to achieve. It is difficult to assess the viability of a particular strategy without being clear what goal or goals we are trying to achieve. Is it simply reducing abortion? Is it making a political or moral statement? Is the focus of the goal more directed to the woman?

One also has to distinguish between short-term and long-term goals and between short-term and long-term achievement of those goals. A realist may very well decide that a strategy doomed to failure in the short-run may succeed in the long-run and thus is worth consistently pushing despite a likelihood or guarantee of short-term failure. In the abortion context, a Catholic realist has to be much attuned to both the short-term and long-term likelihood of success of various strategies and goals.

An important aspect of the viability question concerns how we evaluate the success of steps that might be taken to reduce abortions. Regarding that, an important question is what level of assurance one has to have that a particular strategy will be effective to reduce abortion in order to be comfortable including it as part of a realist solution.

In insisting on viability as an element of a Catholic realist position I

23. See, e.g., Michael New, *A Lesson in Data and Analysis for the New York Times*, <http://www.heritage.org/Research/family/wm1009.cfm> (last visited Apr. 16, 2010).

24. RICHARD STITH, MIRROR OF JUSTICE, HOW THE ABORTION OPTION CAN MAKE WOMEN MORE VULNERABLE TO EXPLOITATION AND ABANDONMENT 3 (2009), <http://mirrorofjustice.blogs.com/mirrorofjustice/stith/abortionwomenvulnerable.pdf>.

don't dismiss the prophetic element of Christian discipleship. Christians are called to speak truth in the world, to be strong witnesses to truth. However, when it comes to what legal and political strategies ought to be employed, realism demands attention to viability.

3. *Consistency with Catholic Moral Teaching*

Self-evidently, for an approach to be a *Catholic* realist position, it has to be consistent with the Catholic position on abortion and also consistent with the Catholic proscription against cooperating with evil.

As I observed earlier, the Catholic stance on abortion is that it is an intrinsic evil. "Direct abortion is *never* a morally tolerable option. It is *always* a grave act of violence against a woman and her unborn child."²⁵ In the words of the United States Conference of Catholic Bishops, "[a]bortion, the deliberate killing of a human being before birth, is never morally acceptable."²⁶

Catholic teaching on material cooperation with evil is designed to address the reality that it is impossible to avoid evil completely. The principles of cooperation are designed to help Catholics discern how to limit their involvement in evil. The application of the Catholic position on material cooperation to the abortion context is addressed in the discussion below.

For present purposes, it is sufficient to observe that in Catholic moral theology, "formal cooperation occurs when one shares the sinful intention of another, while material cooperation occurs when one helps another to sin without sharing in his or her sinful intention."²⁷ Whereas "formal cooperation in sin is action that is the essence of sinful assistance in another's sin . . . material cooperation is action that does, as a factual matter, assist another to sin, but is not in its essence sinful assistance."²⁸

Thus, formal cooperation involves direct participation and sharing of the actor's intent. Material cooperation involves facilitating or creating the conditions that allow the wrongful act to occur without sharing in the

25. United States Conference of Catholic Bishops (USCCB), *Living the Gospel of Life: A Challenge to American Catholics* ¶ 21 (1998), <http://www.usccb.org/prolife/gospel.shtml> [hereinafter USCCB, *Living the Gospel of Life*].

26. USCCB, FAITHFUL CITIZENSHIP: A CATHOLIC CALL TO POLITICAL RESPONSIBILITY 10 (2003), <http://www.usccb.org/faithfulcitizenship/faithfulcitizenship03.pdf> [hereinafter USCCB, FAITHFUL CITIZENSHIP]; see also Congregation for the Doctrine of the Faith (CDF), *Declaration on Procured Abortions* ¶ 18 (Nov. 18, 1974), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html [hereinafter CDF, *Declaration on Procured Abortions*] ("[N]ever, under any pretext, may abortion be resorted to, either by a family or by the political authority, as a legitimate means of regulating births.").

27. Edward A. Hartnett, *Catholic Judges and Cooperation in Sin*, 4 U. ST. THOMAS L.J. 221, 232 (2006).

28. *Id.* at 233.

actor's intent.²⁹ While Catholics are “under a grave obligation of conscience not to cooperate formally” in evil actions,³⁰ material cooperation “can sometimes be justified for proportionate reasons.”³¹ To give an example of this in the abortion context, a Catholic could not, without being guilty of formal cooperation with evil, “vote for a candidate who takes a position in favor of an intrinsic evil, such as abortion or racism, if the voter's intent is to support that position.”³² However, a Catholic who rejects a candidate's unacceptable position may decide to vote for that candidate for other “*morally grave reasons*.”³³ Voting in such a way would be a material cooperation with evil that is justified for proportionate reasons.

II. WHAT MIGHT A CATHOLIC REALIST APPROACH TO ABORTION LOOK LIKE?

Governments achieve their goals through a variety of means. With respect to abortion, there is a broad range of government action that could address a desire to reduce or eliminate abortion. The most restrictive would be to make the vast majority of abortions illegal (as was the case prior to the Supreme Court's 1973 decision in *Roe v. Wade*³⁴). Or *Roe* could simply be overturned, removing the support for the notion of abortion as a right, without necessarily making abortion illegal. Or states and/or the federal government could impose various restrictions on abortions, such as informed consent or parental rights laws. Additionally, there are various other ways a government could act to reduce abortion through efforts aimed at both reducing unwanted pregnancies and addressing the economic factors that might lead one to choose an abortion. Finally, in addition to such legal actions, the government has an impact by how government officials speak publicly about abortion.

It is clear that Catholics “have the right and the duty to recall society to [both] a deeper understanding of human life and to the responsibility of everyone in this regard.”³⁵ Catholics are called to “recover [their] identity as

29. Gregory A. Kalscheur, S.J., *Catholics in Public Life: Judges, Legislators, and Voters*, 46 J. CATH. LEG. STUD. 211, 232–33 (2007).

30. Pope John Paul II, *Evangelium Vitae* ¶ 74 (March 25, 1995), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html.

31. Kalscheur, *supra* note 29, at 232. The requirement that there be proportionate reasons distinguishes justified material cooperation with things like the “I was only following orders” defense where one commits atrocious acts.

32. USCCB, FORMING CONSCIENCES FOR FAITHFUL CITIZENSHIP: A CALL TO POLITICAL RESPONSIBILITY FROM THE CATHOLIC BISHOPS OF THE UNITED STATES ¶ 34 (2007), available at <http://www.usccb.org/faithfulcitizenship/FCStatement.pdf>.

33. *Id.* ¶ 35 (emphasis added).

34. 410 U.S. 113 (1973).

35. CDF, *Doctrinal Note on Some Questions Regarding The Participation of Catholics in Political Life* ¶ 4 (Nov. 24, 2002), available at http://www.vatican.va/roman_curia/

followers of Jesus Christ and to be leaders in the renewal of American respect for the sanctity of life.”³⁶

The “purist” (or fundamentalist) Catholic position is that the law must affirmatively protect the rights of the unborn by, at a minimum, overturning *Roe* and probably more than that. The question, however, is whether a Catholic realist position can live with something less than that. Or to put it more accurately, given that as a political and social matter Catholics will be forced to live with something less,³⁷ the question really is: what should a Catholic realist public policy position on abortion look like?

Certain things are clear. For example, it is clearly not acceptable from a Catholic realist perspective for the government to fund or otherwise facilitate abortions,³⁸ or for Catholics to advocate for laws allowing abortion.³⁹ From a Catholic perspective, such laws would be unjust, regardless of what political consensus might exist for them and promoting their passage would constitute prohibited cooperation with evil. Other questions, however, are more murky.

What I would like to do is explore several questions⁴⁰ as a way of deciding whether it is possible to articulate a Catholic realist position on abortion that might help move us toward the achievement of common

congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html [hereinafter CDF, *Doctrinal Note*]; see also RAYMOND L. BURKE, PASTORAL LETTER, ON THE DIGNITY OF HUMAN LIFE AND CIVIC RESPONSIBILITY 4 (2003), <http://www.priestsforlife.org/magisterium/bishops/burke.pdf> (“Catholics are called to be a community of conscience within the larger society.”).

36. USCCB, *Living the Gospel of Life*, *supra* note 25, ¶ 7.

37. I argue in this Article on the basis of the truth of the premise that in a democratic, pluralist society, Catholics will not achieve attainment of a legal system on all fours with the Catholic view of abortion. If I am wrong about that, then arguably Catholics must and should lobby as strongly as possible to attain such a system. My aim here is to uncover what, less than that, a Catholic can accept in the democratic, pluralist society in which we live.

38. What that means exactly is not entirely clear. Although there appeared to be little historical objection to providing tax deductions for contributions to plans that covered abortion, there is tremendous opposition to any indirect government support of abortion in the public debate over health care reform through, e.g., subsidies to lower income persons that might be used to purchase coverage that includes abortion coverage. See, e.g., *Battle Brews Over Abortion in Health Care Bill*, FOXNEWS, Aug. 27, 2009, <http://www.foxnews.com/politics/2009/08/27/battle-brews-abortion-health-care-fight/>. Various statements issued by American church officials on the subject are collected at <http://www.usccb.org/prolife/issues/healthcare/index.shtml#testimony>.

39. *Evangelium Vitae* makes clear that “[i]n the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit . . . ‘to take part in a propaganda campaign in favour of such a law, or vote for it.’” Pope John Paul II, *Evangelium Vitae*, *supra* note 30, ¶ 73; see also CDF, *Declaration on Procured Abortion*, *supra* note 26, ¶ 22 (declaring that one cannot “take part in a propaganda campaign in favor of such a law, or vote for it”); Bishop Michael J. Sheridan, *A Pastoral Letter on the Duties of Catholic Politicians and Voters* (May 1, 2004), available at <http://www.diocs.org/CPC/Corner/pastoralletters/2004/May.pdf> (explaining that advocating for abortion jeopardizes one’s salvation).

40. At the end of day, I am not sure I succeed in doing more than raising questions, the answers to which are not necessarily clear.

ground. The five questions are:

1. Can a Catholic realist position acknowledge that there is a dignity interest in a woman not being forced to carry a pregnancy to term?
2. To what extent does the level of societal agreement on claims about the moral wrongness of abortion affect the need for the law to restrict abortions?
3. Assuming neither overturning *Roe* nor outlawing abortion is feasible, can a Catholic realist actively support laws that merely restrict abortion?
4. Can a Catholic realist position accept reducing the need for abortions as a primary aim?
5. Assuming access to contraception is *effective at reducing* abortions, can a Catholic realist position support access to contraception?

1. *Can a Catholic realist position accept that there is a dignity interest in women not being forced to carry a pregnancy to term?*

One of the consequences of the polarization of the abortion debate is that each side finds it almost impossible to grant any quarter to the position of the other side. Thus, both pro-choice and pro-life advocates find themselves taking extreme positions out of fear that any movement away from the extreme will give ammunition to the other that will weaken their position.⁴¹ This makes it very difficult to forge common ground.

Central to the Catholic position on abortion is human dignity—the notion that a human life is at issue and must be protected.⁴² That every human person, regardless of stage of life, has dignity and is worthy of respect is a fundamental principle of Catholic social thought.⁴³ From this principle there flows directly a respect of human life from the moment of conception to natural death.⁴⁴ That raises for me the question whether it is possible from a Catholic realist position to acknowledge that there is another dignity interest involved—that is, a dignity interest of the woman in not being forced to carry an unwanted pregnancy to term.⁴⁵

41. The opposing sides of the abortion debate “regularly resort to civil rights and Nazi images to affirm the virtue of their own side and reveal the villainy of the other.” ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* 10 (1993). As one writer criticized, each of the pro-choice and the pro-life forces “deliberately erases the merits of the other side’s arguments and suggests that any nuanced consideration of reality at the margin is tantamount to betrayal of the cause.” Sherry F. Colb, *Sending Out Partial Birth Announcements; Symbolism and Deception by Pro-Life Legislators* para. 23, FINDLAW’S LEGAL COMMENTARY, Jun. 18, 2003, <http://writ.news.findlaw.com/colb/20030618.html>.

42. Pope John Paul II, *Evangelium Vitae*, *supra* note 30, ¶ 74.

43. Susan J. Stabile, *Catholic Legal Theory*, 44 J. CATH. LEGAL STUD. 421, 422–23 (2005).

44. *Id.* at 423.

45. I am indebted to my colleague Jennifer Wright for first raising this question with me. Reva Siegel has also argued that dignity is a value that might bridge the communities divided by the abortion debate, although her understanding of human dignity and the Catholic one are not

Let me be very clear in raising this question. I'm not here making any argument or judgment about the strength of that dignity interest in relation to the dignity interest of the fetus or saying that such an interest ought to lead us to speak about a "right" to abortion. (Indeed, my goal is to get away from "rights" talk.) Nor am I speaking about the morality of a woman choosing not to continue a pregnancy. I'm merely raising the question whether a Catholic realist could recognize that there exists an interest here on the part of the woman in not being forced by the law to use her body in a particular way.

I think there is value in asking this question because perhaps a willingness of pro-life advocates to acknowledge such a dignity interest—that is, to acknowledge that there is an interest on the part of the woman—might encourage pro-choice advocates to acknowledge that there is a life involved on the other side of the equation. It may be that increased dialogue about the personal experiences of women, post-abortion, might help advance understanding of the woman's dignity interest. If both sides could see that there is a legitimate interest on both sides, it might lead to less heat in the public abortion debate.

A fundamental question is what is the nature or meaning of this dignity interest. *Roe v. Wade*⁴⁶ and *Planned Parenthood v. Casey*,⁴⁷ which are discussed in the next section, both speak of a dignity interest of women in terms of autonomy, privacy, and self-determination. Their focus is on a woman's bodily integrity, something that has been recognized, for example, in the criminal context.⁴⁸ Other times "dignity interest" is spoken of in terms of equality: that is, the "dignity interest of the person to be treated as a rational human being, equal with all others."⁴⁹ Human dignity thus becomes equated with respecting the fundamental equality of women and men.

The Catholic notion of human dignity is not coextensive with these secular notions. From a Catholic perspective, human dignity is grounded in our creation in the image of God,⁵⁰ and the corresponding sacredness of the human person. Thus a Catholic articulation of the dignity interest belonging

necessarily synonymous. See Reva B. Siegel, *Dignity and the Politics of Abortion: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008).

46. 410 U.S. 113 (1973).

47. 505 U.S. 833 (1992).

48. See, e.g., *Winston v. Lee*, 470 U.S. 753 (1985) (holding that compelling a criminal defendant to submit to surgery to recover a bullet necessary for the prosecution's case violated bodily integrity of defendant).

49. J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499, 564 n.254 (2004); see Universal Decl. of Human Rights, G.A. Res. 217A, at 71, 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948). ("[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom.").

50. See, e.g., CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, at No. 1934.

to women would focus less on autonomy and self-determination and more on the ability to flourish as a human person.

My own view is that the Catholic conception of human dignity could support recognizing a dignity interest in a woman not being forced to carry a pregnancy to term, at least where the circumstances of the pregnancy are such that it would be difficult for a woman to lovingly welcome a child into her life. This could allow for a dignity interest in a woman not being forced to carry to term a pregnancy that results from an act in which she did not willingly participate, such as rape, and perhaps in other circumstances in which the woman feels an inability to cope with an unintended pregnancy because of economic circumstances or where the pregnancy is the result of incest.⁵¹ However the interest is formulated, simply acknowledging that an interest exists does not compel one to take any particularly position regarding the law and thus, involves no cooperation with evil. It merely acknowledges that there is something important at play in addition to the life of the fetus. Such acknowledgement could be a useful step in the effort to seek common ground and might lead to fruitful discussion about what dignity requires.⁵²

2. *To what extent does the level of societal agreement on claims about the morality of abortion affect the need for law to restrict abortions?*

In its 1973 landmark decision *Roe v. Wade*,⁵³ the Supreme Court ruled that women, in consultation with their physician, have a constitutionally protected right to have an abortion in the early stages of pregnancy—that is, before viability—free from government interference.⁵⁴ In 1992, the Court reaffirmed the right to abortion, albeit not an unlimited one, in *Planned Parenthood v. Casey*.⁵⁵ *Casey* made clear that states may enact restrictions that do not create an “undue burden” for women seeking abortion.⁵⁶ Based on the right created by *Roe* and reaffirmed in *Casey*, pro-choice forces have argued for federal funding of abortions⁵⁷ and for various measures that

51. The articulation in more narrow terms like the examples in the text helps define a limit on the interest which prevents drawing unreasonable conclusions from the existence of the interest. Framed too broadly, one might argue that a women’s dignity interest is relevant not only when the question is a fetus in utero, but with, e.g., a six-month old being carried in a backpack, or perhaps beyond.

52. Of course, acknowledging the interest creates its own complications. Making choices among competing dignity interests will not be easy and inevitably one dignity interest will end up being subordinated to the other.

53. 410 U.S. 113, 163 (1973).

54. The companion case to *Roe*, *Doe v. Bolton*, 410 U.S. 179 (1973), made clear that a woman could obtain an abortion after viability if necessary for her health.

55. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

56. *Id.* at 874. *Casey* maintained the health exception throughout pregnancy, but provided a much narrower exception than did *Bolton*.

57. See, e.g., Julie F. Kay, *If Men Could Get Pregnant: An Equal Protection Model for*

would force those opposed to abortion to facilitate the ability of a woman to obtain an abortion, arguing, for example, that Catholic hospitals should be forced to provide abortions.⁵⁸

The question I think that needs to be explored here is how much mileage we would get from public consensus on the anthropological claims of Catholicism with respect to abortion—that is, that abortion presents a grave moral issue because it involves the taking of a life.

It is clear that it is problematic from a Catholic perspective to treat abortion as simply an aspect of reproductive health that presents no moral issue. Thus, it is difficult to achieve common ground acceptable to Catholics if one's strategy is to agree to take steps to reduce the need for abortion, but still argue that abortion is a viable choice if made freely—a choice that involves no bad or immoral act.

Instead, what I'm asking here is what would be the effect of consensus, reflected in the language used by political leaders and other public commentators, that abortion is a morally wrong act—that it is always a tragic choice when it occurs, that we frown on people using abortion to, for example, select sex. Would such a consensus make it possible from a Catholic perspective to stop short of demanding government action that prohibits people from having abortions or overturns decisions like *Roe* and *Casey*? Or, is agreement on the anthropological question insufficient, such that there must be some legal change, at a minimum overturning *Roe* and *Casey*, to achieve common ground?

It may be that this is largely a hypothetical question at this point. While a significant percentage of the American public believes that abortion is morally wrong,⁵⁹ and while many political figures (e.g., Bill Clinton) have expressed personal opposition to abortion and spoken in terms that suggested that abortion should be safe, legal and rare, President Obama has not expressed personal opposition to abortion and some of his language suggests that he does not view abortion as a tragic choice. Obama has been

Federal Funding of Abortion Under a National Health Care Plan, 60 BROOK. L. REV. 349 (1994). This claim has been rejected and federal funds may not currently be used to fund abortions in most situations. See U.S. Const. amend. V, XIV; Social Security Act, §§ 1901 et seq., 1902(a)(17), 1903(a)(1),(17) as amended 42 U.S.C.A. §§ 1396 et seq., 1396a(a)(17), 1396b(a)(1),(17) (2006). Federal funds may be used in limited circumstances for the “health of the mother” or in rape cases.

58. See, e.g., Robin Fretwell Wilson, *Same-Sex Marriage and Religious Liberty: Life After Prop 8*, 14 NEXUS: CHAP. J. L. & POL'Y 101, 106–107 (2009); see also *Valley Hosp. v. MATSU Coalition for Choice*, 948 P.2d 963, 971 n.18 (Alaska 1997) (stating that “[n]othing said in this opinion should be taken to suggest that a quasi-public hospital could have a policy based on the religious tenets of its sponsors which could be a compelling state interest. Recognizing such a policy as ‘compelling’ could violate the Establishment Clause of the First Amendment to the United States Constitution.”). I think one could make a case that the constitutionalization of the abortion question has been a major contributor to the polarization of the debate.

59. See *supra* note 13.

accused of admitting “at the University of Notre Dame that his views and the views of those who consider abortion an intrinsic evil are irreconcilable. This makes it nearly impossible to find common ground since he views as good what pro-life citizens view as evil.”⁶⁰ On other occasions, he has expressed a commitment to adopting policies that would reduce the actual number of abortions.

The language Obama sometimes employs is very different from that of, for example, Rep. Rosa DeLauro of Connecticut, one of the principal pro-choice sponsors of the proposed Preventing Unintended Pregnancies, Reducing the Need for Abortion, and Supporting Parents Act.⁶¹ De Lauro suggests, “we all want to see fewer unintended pregnancies and abortions” and that “we must also foster an environment that encourages pregnancies to be carried to term.”⁶²

Let’s assume for the purposes of this discussion that the language used by politicians and other commentators consistently sounded more like DeLauro’s language rather than the language often used by pro-choice advocates. What difference would it make to have public acknowledgement “that abortion is not a triumph for anyone” and of “a commitment to work toward a society in which abortion is rare”?⁶³ In thinking about whether a Catholic realist position could accept the continued existence of *Roe* and *Casey* under these circumstances, it is useful to consider several things.

As a starting point, there is a robust debate about the proper role of law in addressing various social ills. While some Catholic commentators have expressed disagreement with arguments made by Professors Skeel and Stuntz⁶⁴ for “legal modesty” in the context of abortion,⁶⁵ even John Paul II acknowledged that law cannot be the primary vehicle for truly profound social change.⁶⁶ That makes it legitimate to question whether it is necessary

60. Denise Hunnell, Robert George vs. Doug Kmiec: How Should a Pro-life Citizen Respond to Obama? (May 28, 2009), <http://www.examiner.com/x-9452-DC-Catholic-Living-Examiner-y2009m5d28-Robert-George-vs-Douglas-Kmiec-How-should-a-prolife-citizen-respond-to-Obama>.

61. Reducing the Need for Abortion and Supporting Parents Act, H.R. 1074, 110th Cong. (1st Sess. 2007).

62. William Saletan, *Culture of Death, The Right-Wing Assault on Abortion Reduction*, SLATE, July 27, 2009, <http://www.slate.com/id/2223661/>.

63. I’m borrowing language here from Amy Uelman, *Dear Mr. President*, AMERICA, Jan. 19, 2009, at 16.

64. David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PA. J. CONST. L. 809 (2006); see John Breen, *Modesty and Moralism: Justice, Prudence and Abortion - A Reply to Skeel & Stuntz*, 31 HARV. J.L. & PUB. POL’Y 219, 243–51.

65. John M. Breen, *John Paul II, the Structures of Sin and the Limits of the Law*, 52 ST. LOUIS U. L.J. 317, 348–351 (2008) (in the case of abortion, concern for protection of human life should trump a concern for legal modesty).

66. Pope John Paul II, *Centesimus Annus* ¶ 36 (May 1, 1991), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html; see Breen, *supra* note 65, at 343.

that law be part of the strategy for reducing abortions under circumstances where we have broad societal agreement that abortion is a moral issue and a moral wrong.

My own inclination is to tend toward a notion of “legal modesty.” Nonetheless, law has an important signaling effect that helps both create and strengthen social norms. As Amy Uelmen has observed, laws “play a very important and sometimes decisive role in influencing patterns of thought and behavior.”⁶⁷ The signaling effect is of potential value even if there were already societal agreement on the moral issue presented by abortion; “the law can reaffirm the values already present in a given culture and so reinforce the non-legal norms operating within it.”⁶⁸

Just as the presence of laws restricting abortion can strengthen a societal norm that recognizes the moral issues presented by abortion, increasingly permissive laws can reinforce the opposite signal. The reality is that “[m]any will take as authorization what is perhaps only the abstention from punishment.”⁶⁹

This is a particular danger since the society in which we live moves so easily from negative rights (that is, a right to be free from interference) to positive rights (that is, entitlements). We so easily blur the line between the law merely permitting something and interpreting that permission to mean that what is permitted is an affirmative good that should be promoted. The reality is that the fact that the law permits something does not mean it is right or moral and therefore does not mean that the law must or should facilitate it. Yet we don’t do a good job of distinguishing a zone of noninterference from positive good and legal entitlement.

This movement is evident in the abortion context. *Roe* established simply that the law should not (in most cases) prevent someone from choosing abortion. Yet from that starting point—a zone of noninterference—many people quickly concluded that every person must accommodate and even support another person’s “right” to have an abortion, and claimed that the government should pay for those who cannot afford to have one.⁷⁰

Having said that, does a Catholic realist need to ask what the value of the signaling effect in terms of abortion rates is? One might answer no,

67. Amelia J. Uelmen, *The Spirituality of Communion: A Resource for Dialogue with Catholics in Public Life*, 43 CATH. LAW. 289, 301 (2004).

68. Breen, *supra* note 65, at 323; *see also* HOWARD LESNICK, LISTENING FOR GOD: RELIGION AND MORAL DISCERNMENT 141 (1998) (observing that “the public avowal of a norm, which is often contained in legal regulation, can have powerful heuristic force in establishing the existence of a [moral] obligation”).

69. *See* CDF, *Declaration on Procured Abortions*, *supra* note 26, ¶ 20.

70. The same is true with contraception. The legal right of a woman to use artificial contraception does not necessarily translate into a claim that someone has to pay for the woman to use it. Yet, that is exactly what we have done.

arguing that the law should make a positive statement regardless of its effect and that, in the case of abortion, a strong pro-life witness is important regardless on the impact on abortion rates. However, if one believes the educative function of the law is meant to change behavior, the effect of a legal statement arguably matters.

Lamentably, this is one of those areas where it is very difficult to assess the evidence. Although there is tremendous disagreement about the effectiveness of the law prior to *Roe* in reducing abortions,⁷¹ it is hard to argue with the conclusion that there has been an increase in the number of the abortions in the years since the Supreme Court's decision in *Roe*.⁷² Equally relevant in terms of the signaling effect is the question whether *Roe* promoted a promiscuous atmosphere that contributes to high unwanted pregnancy rates, which then contributes to an increased use of abortion.⁷³

Nonetheless the Catholic realist concerned with whether the signaling effect of the law will bear results must also consider whether the effect created by *Roe* is reversible.⁷⁴ It may very well be that the genie cannot be put back in the bottle and it is not possible to reverse the "culture of death" we have created.⁷⁵

71. Compare Skeel & Stuntz, *supra* note 64 with Breen, *supra* note 65.

72. The Center for Disease Control (CDC) reports that the abortion rate in the United States from 1970–73 was 10.75 abortions per 1000 women aged 15–44 and that from 1973–76, the abortion rate increased to 17.5. The total number of abortions from 1970–73 was 1.9 million and increased to 3.2 million from 1973–76. The rate has declined since 1990. See Strauss, et al., Abortion Surveillance—United States, 2004 (Nov. 23, 2007), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5609a1.htm>. An updated report providing figures for 2006 is available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5808a1.htm?s_cid=ss5808a1_e.

73. See, e.g., Jonathan Klick & Thomas Statmann, *The Effect of Abortion Legalization on Sexual Behavior: Evidence from Sexually Transmitted Diseases*, 32 J. LEG. STUD. 407 (2003). One commentator lamented that "[e]asy access to abortion has increased the expectation and frequency of sexual intercourse (including unprotected intercourse) among young people, making it more difficult for a young woman to deny herself to a man without losing him, thus increasing pregnancies and sexually transmitted infections." STITH, *supra* note 24 (citing Klick & Statmann, *supra*).

It is also suggested that in "effectively render[ing] the definition of human personhood flexible and negotiable," *Roe* "helped create an environment in which infanticide – a predictable next step along the continuum of killing – is now open to serious examination" and made it easier to accept physician-assisted suicide, fetal experimentation and human cloning. "Each reduces the human person to a problem or an object. Each can trace its lineage in no small part to *Roe*." USCCB, *Living the Gospel of Life*, *supra* note 25, ¶10.

74. There is dispute about the extent to which abortion laws in this country were enforced prior to *Roe*. Compare Skeel & Stuntz, *supra* note 64 with Breen, *supra* note 65. Part of the criticism of Skeel and Stuntz in the use of the law in a situation like abortion is an objection to laws that are enacted purely for symbolic purposes that will rarely, if ever, be enforced. Steel & Stuntz, *supra* note 64, at 829. Whatever position one takes on the historical situation, it is at least an open question how seriously would be the enforcement of such laws if abortion were again made illegal.

75. I'm talking here about attitudes about abortion. I am not giving credence to the genie-out-of-the-bottle argument made by the Supreme Court in *Casey*, that women have a reliance interest in the continued legalization of abortion. *Planned Parenthood of Southeastern Pennsylvania v.*

However, it may also be that more restrictive abortion laws and a legal setting that did not treat abortion as a right might have some positive effect. Regarding the latter, the existence of the *Roe* and *Casey* decisions clearly tilts the scale toward broad acceptance of abortion; the mere overturning of those decisions, without any further legislation addressing abortion, could affect the tenor of discussions as well as the analysis of what legal measures to reduce abortions would be viewed as permissible and desirable.

Where does that leave the Catholic realist? The United States Conference of Catholic Bishops (USCCB) has taken the clear position that it is not enough to seek to reduce abortion where the law allows an intrinsic evil to exist. It argues that “[t]o make intrinsically evil actions legal is itself wrong The legal system as such can be said to cooperate with evil when it fails to protect the lives of those who have no protection except the law.”⁷⁶ In a similar vein, Archbishop Burke suggests that anything less than the whole must be an interim approach and that Catholic politicians must always seek opportunities to overturn “unjust laws” (the category into which he puts *Roe*). In a 2009 Pastoral Letter, Burke wrote:

When Catholic politicians cannot immediately overturn an unjust law, they must never cease to work toward that end. At the very least, they must limit, as much as possible, the evil caused by the unjust law. . . . Catholic politicians are obliged to restrict the scope of the gravest of injustices whenever the opportunity presents itself.⁷⁷

Such language does not seem to permit of a conclusion that law need not be part of the scheme for addressing abortion. But I think a Catholic realist position needs to at least seriously consider the possibility.

3. Assuming neither outlawing Roe nor outlawing abortion is feasible, can

Casey, 505 U.S. 833, 856 (1992) (arguing that “for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail”). Far more persuasive, I think is the argument the Court rejected, that any reliance interest is minimal because “reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.” *Id.*

76. USCCB, *Catholics in Political Life* 1 (2004), available at <http://www.usccb.org/bishops/catholicsinpoliticallife.shtml>; see also Pope John Paul II, *Evangelium Vitae*, *supra* note 30, ¶ 73. Discussing the Supreme Court’s having made abortion a constitutional right, the USCCB says, “Those who formulate law therefore have an obligation in conscience to work toward correcting morally defective laws, lest they be guilty of cooperating in evil and in sinning against the common good.” USCCB, *Catholics in Political Life*, *supra*. The USCCB advocates constitutional protection for the unborn and urges Catholics to support legislation aimed at protecting life to the “maximum degree possible.” USCCB, FAITHFUL CITIZENSHIP, *supra* note 26, at 10.

77. BURKE, *supra* note 35, at 11. This is consistent with Augustine’s notion that an unjust law is no law at all. SAINT AUGUSTINE, ON FREE CHOICE OF THE WILL 11 (Anna S. Benjamin & L.H. Hackstaff trans., Bobbs-Merrill 6th prtg. 1982) (1964).

a Catholic realist actively support laws that merely restrict abortions?

The previous question leads directly to this one. If a Catholic realist position cannot go so far as to say no legal strategy is required, can it content itself with seeking legal changes that would restrict abortion, but still permit women to obtain them in some circumstances? This would include, for example, laws requiring counseling or ultrasound (or other means of ensuring informed consent), laws requiring waiting periods, parental consent laws, and bans on partial-birth abortions.

There is, of course, the practical matter of whether one can secure “common ground” agreement on any of these. One effect of the polarization of the abortion debate is that any effort to secure agreement on any restrictions is made difficult by the pro-choice perception of any limit as the beginning of a slide down a slippery slope. Having said that, it may be possible to obtain agreement on abortion restrictions if it were part of a coordinated effort to enact measures to reduce abortion.

It is clear that a “well-formed Christian conscience does not permit one to vote for a political program or an individual law which contradicts the fundamental content of faith and morals.”⁷⁸ The question is whether supporting laws that limit abortion rather than prohibit it altogether “would be licit, based on the theory of the lesser evil, to be responsible for the passage of a law or the application of a strategy which, while being unjust in the abstract, would effectively reduce evil and thus be considered *hic et nunc* as morally acceptable or defensible.”⁷⁹

The Congregation for the Doctrine of the Faith’s (CDF) *Declaration on Procured Abortions*, a pre-*Evangelium Vitae* document, acknowledges that the law “must often tolerate what is in fact a lesser evil, in order to avoid a greater [evil].”⁸⁰ Similarly, *Evangelium Vitae* teaches that

[w]hen it is not possible to overturn or completely abrogate a pro-abortion law, an elected official, whose absolute personal opposition to procured abortion was well known, could licitly support proposals aimed at limiting the harm done by such a law and at lessening its negative consequences at the level of general opinion and public morality. This does not in fact represent an illicit cooperation with an unjust law, but rather a legitimate and proper attempt to limit its evil aspects.⁸¹

The language of *Evangelium Vitae* suggests several things. First, it

78. CDF, *Doctrinal Note*, *supra* note 35, ¶ 4.

79. Angel Rodriguez Luno, *Evangelium Vitae 73: The Catholic Lawmaker and the Problem of a Seriously Unjust Law*, L’OSSERVATORE ROMANO, Nov. 4, 2008, at 3–5.

80. CDF, *Declaration on Procured Abortion*, *supra* note 39, ¶ 20.

81. Pope John Paul II, *Evangelium Vitae*, *supra* note 30, ¶ 73; *see also* Charles E. Rice, *Abortion, Euthanasia, and the Need to Build a ‘New Culture of Life’*, 12 NOTRE DAME J. L. ETHICS & PUB. POL’Y 497, 519 (1998).

suggests that the opposition of a person supporting the measure must be “well-known.” As Luno phrases it, “the absolute personal opposition to abortion on the part of the lawmaker is known to all, thus preventing any confusion or scandal.”⁸²

Second, the tenor of the language suggests that support for such laws must be in the context of an objective to achieve a more total ban in a situation where such a total ban is unachievable. The CDF *Doctrinal Note* suggests that *Evangelium Vitae* envisions a “situation in which it is not possible to overturn or completely repeal a law allowing abortion which is already in force or coming up for a vote.”⁸³ Burke, cited earlier, suggests Catholic politicians “must never cease to work toward” the end of overturning unjust laws.⁸⁴ The USCCB says those who legislate “have an obligation in conscience to work toward correcting morally defective laws, lest they be guilty of cooperating in evil and in sinning against the common good.”⁸⁵

A third point, implied by the second, is that support for such laws must be in the context of there being a more permissive abortion law already in effect or being voted on. Thus, for example John Finnis argues that “[t]he meaning and content of the relevant choices and actions of legislators is conditioned by the procedural context.”⁸⁶ He argues that a legislator may support a facially unjust law like “[a]bortion is lawful up to 16 weeks” if the context is that abortions are already legal up to the twenty-fourth week.⁸⁷ Finnis argues this would be “formal cooperation in making a just change in the law, but not in the retaining of the unjust denial of legal protection to unborn children up to 16 weeks.”⁸⁸ Since the support of the bill is, however, material cooperation in the legislative act of continuing to deny protection to such unborn children, whether that material cooperation can be justified depends on taking “steps to minimize scandal.”⁸⁹

A separate question, but one very much relevant to whether a Catholic realist position could support such laws is whether they are effective, another area in which there is factual disagreement. Some have argued that “there is little evidence that state policies restricting access to abortion (such as enforced informed and parental consent laws and partial-birth abortion legislation) affect the abortion rate.”⁹⁰ However, other evidence

82. Luno, *supra* note 80.

83. CDF, *Doctrinal Note*, *supra* note 35, ¶ 4.

84. BURKE, *supra* note 35, at 9.

85. USCCB, *Catholics in Political Life*, *supra* note 76, at 1.

86. John Finnis, *Unjust Laws in a Democratic Society: Some Philosophical and Theological Reflections*, 71 NOTRE DAME L. REV. 595, 599 (1996).

87. *Id.* at 601.

88. *Id.*

89. *Id.* at 601–02.

90. JOSEPH WRIGHT, CATHOLICS IN ALLIANCE FOR THE COMMON GOOD, REDUCING

suggests that states that adopted pro-life legislation during the 1990s experienced larger reduction in abortion rates and ratios than those states that did not adopt such legislation.⁹¹ It may be that some types of restrictions are more effective than others.⁹²

The question of effectiveness means, from a Catholic realist perspective, that one can't just talk about "limitations" in broad terms. One must also consider the effectiveness of the particular limit being discussed.⁹³ How much a Catholic realist needs to be convinced of the effectiveness of a particular limit is a different question. Arguably the presumption should be in favor of a limit that has a reasonable chance of success.

ABORTION IN AMERICA: THE EFFECT OF SOCIOECONOMIC FACTORS 2 (2008).

91. MICHAEL J. NEW, ANALYZING THE EFFECTS OF STATE LEGISLATION ON THE INCIDENCE OF ABORTION DURING THE 1990s (2004), available at <http://www.heritage.org/Research/Reports/2004/01/Analyzing-the-Effects-of-State-Legislation-on-the-Incidence-of-Abortion-During-the-1990s>. A recent study suggests that the reduction in the abortion rate is due to a reduction in abortion providers. See Marshall Medoff, *The Relationship Between State Abortion Policies and Abortion Providers*, 26 GENDER ISSUES 224 (2009) (concluding that Medicaid funding restrictions, parental involvement laws and targeted regulation of abortion providers annual licensing fees significantly deter physicians or organizations from becoming or remaining abortion providers).

92. Parental consent laws appear to do very little to reduce abortions; six in ten minors who have an abortion report that at least one parent knew about it. See Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196, 196–207, 213 (1992). Such laws may, nonetheless, be valuable in providing parental support for the minor. See *Informational Forum on Parental Notification of Abortion: Hearing Before the Select Comm. on Children*, 2007 Leg. 14 (Conn. 2007) (testimony of Teresa Stanton Collett); see also Teresa Stanton Collett, *Transporting Minors for Immoral Purposes: The Case for The Child Custody Protection Act & The Child Interstate Abortion Notification Act*, 16 HEALTH MATRIX 107, 111–12 (2006) (discussing pressure put on young girls by sexual partners in situations where they obtain abortions without parental consent). In contrast, there is evidence that suggests that informed consent laws have had some effect. See NEW, *supra* note 91, at 3 (citing AGI and CDC data). Part of the difficulty of assessing the effect of individual state laws stems from women traveling from one state to another to avoid the effect of restrictive laws, which means one cannot simply look at a decline in abortion in a state that enacts such a measure. The experience in Poland has been exactly that: Poland has numerous restrictive laws on abortion so Polish women travel to countries where it is easier to get an abortion or have underground abortions. See UNITED NATIONS POPULATION DIVISION ABORTION POLICIES: A GLOBAL REVIEW 40 (2001), available at <http://www.un.org/esa/population/publications/abortion/doc/poland.doc>. The same is true in Ireland; the effect of its restrictive laws is the people simply travel to England. See, e.g., Janessa L. Bernstein, Note, *The Under Ground Railroad to Reproductive Freedom: Restrictive Abortion Laws and the Resulting Backlash* 73 BROOK. L. REV. 1463, 1504 (2008). Another difficulty in assessing effectiveness arises because many of the laws are not necessarily enforced.

93. Even if such a strategy were successful from a Catholic realist perspective, that doesn't mean such a strategy would be universally accepted. Rice, *supra* note 81, at 520 (criticizing incremental approach as self-defeating); Charles E. Rice, *A Cultural Tour of the Legal Landscape: Reflections on Cardinal George's Law and Culture*, 1 AVE MARIA L. REV. 81, 96–97 (2003) (same).

4. *Can a Catholic realist position accept reducing abortions by means other than making them illegal as a primary aim?*

Questions four and five ask a different version of question three, both focusing on whether it is possible to substantially reduce abortions without making them illegal.⁹⁴ My focus in this section is on reducing abortions by addressing the economic pressures that impact a woman's decision to abort. In the next section, I will separately address efforts to reduce abortions by reducing unwanted pregnancies—that is, the issue of access to contraception.

The economic issue is one that cannot be ignored. Fifty-seven percent of women who have abortions have incomes 200 percent below the poverty level.⁹⁵ Whereas women earning more than three times the poverty level have 25 percent of all abortions, women living at less than two times the poverty level (30 percent of all women) have 57 percent of abortions.⁹⁶ Such statistics prompt the suggestion that “elected officials can utilize effective and appropriate socioeconomic public policies to reduce abortions.”⁹⁷

There are a variety of possible strategies that attempt to alter the decision to abort on economic grounds, such as providing economic support for pregnant women (pre-natal care) and new mothers (health care, child care, nurses for new mothers with infants, etc.), providing economic incentives and greater support for adoptions, as well as policies that increase male employment rates and reduce poverty.

The proposed Ryan/DeLauro Reducing the Need for Abortion and Supporting Parents Act is illustrative of a coordinated effort to address the economic causes of abortion. The statute, *inter alia*, (1) provides for expanded Medicaid and SCHIP coverage of pregnant women; (2) prohibits health insurers from treating pregnancy as a preexisting condition; (3) provides for supportive services for women who learn through ultrasound that they are carrying a fetus with Down Syndrome and other prenatally

94. The flip side of the question, of course, is: if we don't address the causes of abortion, it is questionable whether any legal strategy will effectively reduce or eliminate abortions.

95. Rachel K. Jones et al., *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000–2001*, 34 PERS. ON SEXUAL AND REPROD. HEALTH 226, 231 (Sept./Oct. 2002), available at <http://www.guttmacher.org/pubs/journals/3422602.pdf>.

96. Helen M. Alvaré, *The Consistent Ethic of Life: A Proposal for Improving Its Legislative Grasp*, 2 U. ST. THOMAS L.J. 326, 336 (2005).

97. WRIGHT, *supra* note 90, at executive summary. Given that conclusion, it is unfortunate to realize that some of the strongest opponents of economic policies that might affect a low-income woman's decision to keep a child or abort are pro-life. Cristina Page, *Pro-Life Pretense*, HUFFINGTON POST, Oct. 23, 2009, http://www.huffingtonpost.com/cristina-page/pro-life-pretense_b_331070.html. The CDF data analyzed in the foregoing are available at CHILDREN'S DEF. FUND, 2007 CHILDREN'S DEFENSE FUND ACTION COUNCIL NONPARTISAN CONGRESSIONAL SCORECARD (2008), available at <http://www.cdfactioncouncil.org/cdf-action-council-congressional-votes-scorecard/>.

diagnosed conditions; (4) provides support for students who become pregnant so that they can continue their education; (5) funds group housing for pregnant and parenting women and, as a requirement for funding of such homes, requires the provision of both adoption counseling and counseling on parenting skills; (6) expands adoption assistance; and (7) provides support for new parents under supplemental nutrition programs.⁹⁸

It is hard to argue against measures such as the foregoing, each of which has benefits above and beyond whatever affect they might have on the abortion rate. Nonetheless, notwithstanding its intuitive appeal, a number of interrelated factors at least raise the question about how effective this strategy will be in reducing abortions.

The first relates to a point I made earlier. One has to factor in the evidence suggesting that legalization of abortion contributes to a promiscuous atmosphere that contributes to high unwanted pregnancy rates resulting in an increased use of abortion.

As one commentator noted, “Easy access to abortion has increased the expectation and frequency of sexual intercourse (including unprotected intercourse) among young people, making it more difficult for a young woman to deny herself to a man without losing him, thus increasing pregnancies and sexually transmitted infections.”⁹⁹

Related to this is evidence suggesting that states that adopted pro-life legislation during the 1990s experienced a larger reduction in abortion rates than those states that did not adopt such legislation. This suggests there is much more at play than economic pressures.

Finally, assessing the potential effectiveness of economic strategies also requires assessing evidence that many abortions are the result of outside pressure. One study found that 64 percent of American woman who have

98. Reducing the Need for Abortion and Supporting Parents Act, H.R. 1074, 110th Cong. (1st Sess. 2007). The Act also contains a number of provisions designed to address non-economic factors contributing to abortions, such as increased funding for after-school programs (based on a finding that the likelihood of unintended teen pregnancy increases with the number of unsupervised hours teens have during the week); grants to provide support for innovative and creative ways to prevent teenage pregnancy; resources to promote and strengthen communication between parents and teens based on findings that teens with strong emotional attachments to their parents are more likely to delay becoming sexually active; educational programs (discussed in greater detail *infra*); and funding for training of health care and other professionals to identify, treat and refer women who are victims of rape and domestic violence. *Id.*

99. STITH, *supra* note 24, at 3 (citing Klick & Statmann, *supra* note 73, at 407). This is another point of common ground with at least some feminists. Catharine MacKinnon’s critique of *Roe* was that “abortion facilitates women’s heterosexual availability.” CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 99 (1987). She argues that “under conditions of gender inequality, sexual liberation in this sense does not free women; it frees male sexual aggression.” *Id.* (also noting that “[t]he Playboy Foundation has supported abortion rights from day one”); see also Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1408–09 (2009) (arguing that *Roe* “legitimizes both unwanted sex and the hierarchies of power that generate it”).

abortions feel pressured to do so by others.¹⁰⁰ How much that pressure would continue to operate if we addressed economic concerns is open to question.

There is no question that from a Catholic perspective, economic strategies are clearly permissible, even desirable, as part of a comprehensive strategy to address abortion. The CDF *Declaration on Procured Abortion* speaks of the importance of putting “positive policy” into force “so that there will always be a concrete, honorable and possible alternative to abortion.”¹⁰¹ And the USCCB has advocated a comprehensive strategy to reduce abortions.¹⁰²

However, the question is whether a focus on economic solutions alone represents a viable Catholic realist position. There has been consistent criticism of Catholics who focus on poverty and other economic issues without being consistently pro-life.¹⁰³ Even focusing on economic issues as a strategy for promoting pro-life goals probably will not quell criticism from those who believe that the economic solution does not do enough to reduce or eliminate abortions.

On the other hand, what if trying to do more is counterproductive? What if attempts to reduce abortion through legal means create more polarization, making it actually more difficult to enact policies likely to reduce abortions? I’m not suggesting it necessarily is. It may be that pro-life and pro-choice advocates can both agree that reducing abortions is morally justifiable and find common ground regarding some level of restrictions. The point is that a Catholic realist position must take into account what is possible and what is counterproductive; that it must take into account what will be most effective in decreasing the number of abortions.

5. *Assuming access to contraception is effective at reducing abortions, can a Catholic realist position support access to contraception?*

One of the more contentious issues surrounding the abortion debates has to do with the question of contraception. Even many Catholics do not accept the Church’s position on artificial contraception¹⁰⁴ and non-Catholics

100. Vincent M. Rue et al., *Induced Abortion and Traumatic Stress: A Preliminary Comparison of American and Russian Woman*, 10 MED. SCI. MONITOR SR9 (2004); see also STITH, *supra* note 24, at 4 (“American women almost always abort to satisfy the desires of people who do not want to care for their children.”) (citing FREDERICA MATHEWES-GREEN, *REAL CHOICES* (1994)).

101. CDF, *Declaration on Procured Abortions*, *supra* note 26, ¶ 23.

102. See, e.g., USCCB, *Living the Gospel of Life*, *supra* note 25, ¶¶ 34–39 (encouraging all Catholics to “embrace their citizenship” in order to build a culture of life).

103. BURKE, *supra* note 35, at 7 (“Catholics therefore cannot legitimately believe that, if they support programs for the poor and marginalized, this ‘makes up’ for not being consistently prolife.”).

104. See the data from the National Center for Health Statistics, in R. Fehring & A.M. Schlidt, *Trends in Contraceptive Use Among Catholics in the United States: 1988-1995*, 68 LINACRE Q.

have difficulty understanding how the Church can oppose something that seems to them self-evidently an important part of an anti-abortion strategy.¹⁰⁵

There are two parts to this question. First, can we deal with reducing abortions as a realistic matter without addressing contraception? Second, if the answer to that is no (as many believe), then the relevant question is whether a Catholic, without materially cooperating with evil, can accept the use of contraception for the purpose of reducing abortions.

First, does access to contraception reduce abortion? This is an issue as to which there is strong divergence of view, creating tremendous difficulty from a Catholic realist perspective. If, on the one hand, one accepts “unplanned pregnancy” as the leading cause or reason for obtaining an abortion, then it seems intuitive—and many believe it to be so—that providing robust access to, and education about, contraception would be one of the best ways to reduce abortions.¹⁰⁶ On the other hand, somewhat paradoxically, there is evidence that once contraception became an accepted means of regulating births, the unintended birth rate actually increased,¹⁰⁷

170 (May 2001).

105. In addition to the belief about the relationship between access to contraception and reduced abortions, many view the Church’s stance on contraception as reflecting a desire to subjugate women. Luke Timothy Johnson, *Sex, Women & the Church: The Need for Prophetic Change*, COMMONWEAL, June 20, 2003, at 11, 16 (noting the perception by many people that “lacking a convincing theological basis, the magisterium’s intractability on [contraception] is really about keeping women in their place and maintaining the aura of papal authority”). I have argued against this view in Susan J. Stabile, *The Challenges of Opening a Dialogue Between Catholic and Secular Feminist Legal Theories*, 48 J. CATH. LEG. STUD. 219, 240–51 (2009).

106. See, e.g., Jennifer Shaw, *The Prevention First Act Examined: An Overview of the State of Contraception Law as Viewed Through the Lens of Federal Legislation*, 30 WOMEN’S RTS. L. REP. 700, 704–05 (2009).

107. See, e.g., G. E. M. Anscombe, *Contraception and Chastity*, in WHY HUMANE VITAE WAS RIGHT: A READER 119, 124 (Janet Smith ed., 1993). But see Cicely Marston and John Cleland, *Relationships Between Contraception and Abortion: A Review of the Evidence*, 29 INT’L FAM. PLAN. PERSPEC. 6, 6 (Mar. 2003), available at <http://www.guttmacher.org/pubs/journals/2900603.pdf>.

In seven countries—Kazakhstan, Kyrgyz Republic, Uzbekistan, Bulgaria, Turkey, Tunisia and Switzerland—abortion incidence declined as prevalence of modern contraceptive use rose. In six others—Cuba, Denmark, Netherlands, the United States, Singapore and the Republic of Korea—levels of abortion and contraceptive use rose simultaneously. In all six of these countries, however, overall levels of fertility were falling during the period studied. After fertility levels stabilized in several of the countries that had shown simultaneous rises in contraception and abortion, contraceptive use continued to increase and abortion rates fell. The most clear-cut example of this trend is the Republic of Korea.

Id.

In 2006, when the Guttmacher Institute issued a report card ranking the fifty states by how aggressively they promote contraceptives, the embarrassing fact emerged that New York, California and other states receiving the highest grades also had some of the highest abortion rates in the country; some states ranked near the bottom by Guttmacher, such as Kansas and the Dakotas, have the lowest abortion rates. GUTTMACHER INSTITUTE, CONTRACEPTION COUNTS: RANKING STATE EFFORTS (2006), available at <http://www.guttmacher.org/pubs/>

suggesting that access to contraception is not likely to reduce abortion. In fact, evidence suggests that a small percentage of abortions involve women lacking access to contraception.¹⁰⁸

Pope John Paul II addressed this issue quite clearly in *Evangelium Vitae*, rejecting the assertion “that contraception, if made safe and available to all, is the most effective remedy against abortion,” and arguing that the “contraceptive mentality” promotes an unwillingness to accept responsibility.¹⁰⁹ He writes,

It may be that many people use contraception with a view to excluding the subsequent temptation of abortion. But the negative values inherent in the “contraceptive mentality”—which is very different from responsible parenthood, lived in respect for the full truth of the conjugal act—are such that they in fact strengthen this temptation when an unwanted life is conceived.¹¹⁰

Although accepting the fact that abortion and contraception are “specifically different evils,” he argues that they are

often closely connected, as fruits of the same tree. It is true that in many cases contraception and even abortion are practiced under the pressure of real-life difficulties, which nonetheless can never exonerate from striving to observe God’s law fully. Still, in very many other instances such practices are rooted in a hedonistic mentality unwilling to accept responsibility in matters of sexuality, and they imply a self-centered concept of freedom, which regards procreation as an obstacle to personal fulfillment. The life which could result from a sexual encounter thus becomes an enemy to be avoided at all costs, and abortion becomes the only possible decisive response to failed contraception.¹¹¹

Whatever one thinks of the validity of Pope John Paul’s statements, there is a reality that Catholic realism has to face: a norm of smaller family size and a culture in which control over not only the size of the family but the timing and spacing of children is important. That norm may be

2006/02/28/IB2006n1.pdf; see KRISTIN LUKER, TAKING CHANCES: ABORTION AND THE DECISION NOT TO CONTRACEPT 5 (1978).

108. Only 8.1 percent of all women obtaining abortions had never used contraception. Only 2.1 percent of all women who had never used contraception did not know where to obtain contraception. Only 7.9 percent of all women who had never used contraception cited financial reasons (e.g., methods too expensive, no money, etc.) for non-use. Rachel Jones et al., *Contraceptive Use Among U.S. Women Having Abortions in 2000–2001*, 34 PERSP. ON SEXUAL AND REPRO. HEALTH 294, 296, 298 (Nov./Dec. 2002), available at <http://www.guttmacher.org/pubs/journals/3429402.pdf>.

109. John Paul II, *Evangelium Vitae*, *supra* note 30, ¶ 13.

110. *Id.*

111. *Id.*; see also Pope Benedict XVI, *Caritas in Veritate* ¶ 15 (June 29, 2009), available at http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html.

inconsistent with Catholic thought.¹¹² Nonetheless, that is the culture in which we live, a culture to some extent the product of women being more educated and working outside of the home in large numbers. A Catholic realist can't ignore or simply wish away this reality. Absent the ability to change the norm, the Catholic realist needs to work to obtain what can be obtained within the framework of the existing norm, consistent with Catholic teaching.

Whatever one ultimately thinks about the first question, the more interesting question from the perspective of this Article is: assuming that access to contraception will in fact reduce the number of abortions, can a Catholic realist position support access to contraception?

The position of the Catholic Church on contraception is unambiguous. The Catechism of the Catholic Church labels as "intrinsically evil" any action which, "whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible."¹¹³ In his 1930 encyclical, *Casti Connubii*, Pope Pius XI reaffirmed earlier Church statements that procreation was the primary end of human sexuality and that the use of means to deprive the sexual act of its power of procreating life "is an offense against the law of God and nature, and those who indulge in such are branded with the guilt of a grave sin."¹¹⁴

112. I say "may be" because the Catholic Church accepts the use of natural family planning as a means to control the spacing and number of births. Pope Paul VI, *Humanae Vitae* ¶ 11 (July 25, 1968), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html.

113. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, at No. 2370 (quoting Pope Paul IV, *Humanae Vitae*, *supra* note 112, ¶ 14). The Church's early (and consistent) opposition to contraception is something that separated Christianity from the pagan culture. See St. Augustine, *Marriage and Concupiscence*, 1:15:17 (A.D. 419); St. John Chrysostom, *Homilies on Romans*, 24 (A.D. 391); and others, available at www.catholic.com/library/Contraception_and_Sterilization.asp. I discuss the historical development of the Church's position on artificial contraception in Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J. L. & PUB. POL'Y 741, 750 n.37 (2005).

114. Pope Pius XI, *Casti Connubii* ¶ 56 (Dec. 31, 1930), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html. Although the Church now speaks of the unitive and procreative aspects of marriage and sexuality as being equally important, thus moving away from the position that human sexuality is primarily procreative, it continues to reaffirm the ban on artificial birth control.

Twenty years later, Pope Pius XII claimed that the condemnation of artificial contraception "is as valid today as it was yesterday; and it will be the same tomorrow and always, because it does not imply a precept of the human law but is the expression of a law which is natural and divine." Pope Pius XII, *Address to the Midwives on the Nature of Their Profession* (Oct. 29, 1951), available at <http://www.papalencyclicals.net/Pius12/P12midwives.htm>. This reflects the belief that the unitive and procreative values "cannot be separated without altering the couple's spiritual life and compromising the goods of marriage and the future of the family." CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, at No. 2363. Some dispute the conclusion that the Church's opposition to artificial contraception is demanded by natural law. See, e.g.,

Despite recognizing the substantial opposition to the Church's teachings on artificial contraception,¹¹⁵ Pope Paul VI reiterated the position in 1969 in *Humanae Vitae*, stating that "there are certain limits, beyond which it is wrong to go, to the power of man over his own body and its natural functions," limits which "are expressly imposed because of the reverence due to the whole human organism and its natural functions."¹¹⁶ In his 1995 encyclical, *Evangelium Vitae*,¹¹⁷ Pope John Paul II expressed the Church's continued moral opposition to artificial means of birth control, based on the "sacredness" and "inviolability" of life.¹¹⁸

Notwithstanding the clarity of the Church's position on contraception, the question I am raising is this: if abortion is worse than contraception, can one "support" the latter to avoid the former? It is clear that the Church makes a distinction between abortion and artificial contraception. Although the Church has been consistent in recent years in its efforts to secure a change in the law regarding abortion, it has not felt the need to actively oppose legal access to contraception.¹¹⁹ Whether based on a notion that the former involves a matter of public morality whereas the latter involves a matter of private morality, and thus a matter not appropriate for the law to address, or on the ground that the former involves the actual ending of life

Richard H. Beis, *Contraception and the Logical Structure of the Thomist Natural Law Theory*, 75 ETHICS 277 (1965).

115. Pope Paul IV, *Humanae Vitae*, *supra* note 112, ¶ 17; see Charles E. Curran, *Humanae Vitae: Still Controversial at 30*, NAT'L CATH. REP., July 31, 1998, at 12 (observing that many Catholics were expecting a change in church teaching and quoting Fr. Andrew M. Greeley that the issuance of *Humanae Vitae* was "the occasion for massive apostasy and for notable decline in religious devotion and belief"). *But see generally* WHY HUMAN VITAE WAS RIGHT: A READER (Janet Smith ed., 1993).

This included opposition by the Birth Control Commission established at the request of Pope John XXIII to study the issue. The Commission, which consisted of theologians, priests, bishops, cardinals and laypersons, concluded that artificial contraception was not intrinsically evil and that Catholic couples should be free to determine for themselves what method of family planning to employ. *See Birth Control Commission Texts: Translation of the Final Report to Pope Paul*, NAT'L CATH. REP., Apr. 19, 1967, at 8; Leslie Griffin, *What Might Have Been: Contraception and Religious Liberty*, 1 U. ST. THOMAS L.J. 632, 633-34 (2003).

116. Pope Paul IV, *Humanae Vitae*, *supra* note 112, ¶ 17.

117. Pope John Paul II, *Evangelium Vitae*, *supra* note 30.

118. *Id.* ¶¶ 13, 40; see also CDF, *Persona Humana* (Dec. 29, 1975), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19751229_persona-humana_en.html; Pope John Paul II, *Familiaris Consortio* (Nov. 22, 1981), available at http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html; Pope John Paul II, *Veritatis Splendor* (Aug. 6, 1993), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html.

119. In the mid-1960s, when Massachusetts proposed decriminalizing the supplying of artificial contraception devices, Cardinal Richard Cushing of Boston invited John Courtney Murray to make recommendations for how Catholics should respond to the proposal. I discuss Murray's argument for why the Catholics need not oppose the Massachusetts regulation in Susan J. Stabile, *John Courtney Murray and the Abortion Debate*, 4 VILL. J. CATH. SOC. THOUGHT 87 (2007).

whereas the latter prevents life from coming into being, contraception appears to be a “lesser evil” from the Catholic perspective.

Thus, as phrased earlier, the question is whether “it would be licit, based on the theory of the lesser evil, to be responsible for the passage of a law or the application of a strategy which, while being unjust in the abstract, would effectively reduce evil and thus be considered *hic et nunc* as morally acceptable or defensible.”¹²⁰

The first question that has to be asked, harkening back to an earlier point, is to consider whether context makes a difference. If we say, for example, that abstinence is better, that young girls should not be having sex, that sex does matter, etc., does that make it easier for Catholics to accept contraception as part of the equation for reducing the number of abortions?¹²¹ Illustrative is the Ryan/DeLauro approach. It requires that applicants for grants for programs for preventing teen pregnancies agree that the project will “encourage[e] teens to delay sexual activity and provid[e] educational services and interventions, including information about contraception for sexually active teens or teens at risk of becoming sexually active.” It also requires that all information provided “will be age-appropriate, factually and medically accurate and complete, and scientifically based.”¹²² The statute also provides for “educating both young men and women about the responsibilities and pressures that come along with parenting,” “helping parents communicate with teens about sexuality,” and “teaching young people responsible decisionmaking.”¹²³

However, even put in the best positive context, the language of *Humanae Vitae* makes it difficult to think the Church could be persuaded of this approach. Although recognizing that it is at times “lawful to tolerate a lesser moral evil in order to avoid a greater or in order to promote a greater good,” *Humanae Vitae* suggests that it is never permissible to support something that is intrinsically evil.¹²⁴ In that Encyclical Paul VI wrote, “it is never lawful, even for the gravest reasons, to do evil that good may come of it—in other words, to have as the object of a positive act of the will something which intrinsically contradicts the moral order . . . even though the intention is to protect or promote the welfare of an individual, or a family or of society in general,”¹²⁵ a statement that was reaffirmed by Pope

120. Luno, *supra* note 79, at 3–5.

121. Also relevant to context is the viability of other approaches.

122. Reducing the Need for Abortion and Supporting Parents Act, H.R. 1074, 110th Cong. § 102(c) (1st Sess. 2007).

123. *Id.* The legislation would also provide coverage for family planning services. A separate question relevant to the Catholic realist is whether any of these steps will have any effect. It is not entirely clear that educating teens about the responsibilities of parenting has any effect on their sexual activity.

124. Pope Paul IV, *Humanae Vitae*, *supra* note 112, ¶ 14.

125. *Id.*

John Paul II in *Veritatis Splendor*.¹²⁶ In the words of one professor of moral theology, “a moral evil may not be the direct object of the will, even when it is a lesser evil What is intrinsically evil cannot be the direct object of the will, no matter what the cost.”¹²⁷

The Church believes artificial contraception to be an intrinsic evil. It is convinced that the “port of entry for the culture of death in our society has been the abandonment of the respect for the procreative meaning of the conjugal act. It is the contraceptive way of thinking, the fear of the life-giving dimension of conjugal love, which very much sustains that culture.”¹²⁸

Given that, there doesn’t seem to be any play in the joints here. While the Church may not feel it necessary to insist on legal measures to prevent access to contraception, I think it impossible from a Catholic realist perspective to include active support for the use of artificial contraception, even if doing so would reduce the actual number of abortions. In contrast to the economic strategies discussed earlier, which involve no intrinsic evil, it does not seem that contraception can be part of a Catholic realist approach to abortion. This will be a difficult conclusion for many people to accept, including those Catholics who do not accept the Church’s position on artificial contraception.¹²⁹ Nonetheless, a Catholic realist position must accord with Catholic teaching on intrinsic evil.

Where there is a lot of room for common ground, however, is in what I labeled before as “context”—that is, the culture surrounding sex, particularly among young people. Rather than focusing on arguments over access to contraception vs. abstinence-only education, Catholic realists could profitably join forces with feminists and other advocates of pro-choice to try to effect a shift in the cultural expectation of sexual activity among the young. There is clearly no formal or material cooperation in evil for a Catholic realist to work with secular forces to try to change what might be referred to as either a culture of promiscuity or a culture of sexual inevitability,¹³⁰ to help women (young and old) understand they have both a right and an obligation to themselves to not engage in unwanted sex. This is an approach to reducing abortion on which we all ought to be able to agree.

CONCLUSION

I think there are difficulties in trying to articulate a Catholic realist

126. Pope John Paul II, *Veritatis Splendor*, *supra* note 118, ¶ 80.

127. Luno, *supra* note 79, at 3–5.

128. BURKE, *supra* note 35, at 12.

129. See *supra* note 104 and accompanying text.

130. Robin West has told me she prefers the latter term because of a belief that many young women feel pressured into sexual activity they do not desire because of a sense that sex is inevitable.

approach to abortion. First, some of the questions I have raised here do not admit of easy answers.

Second, although at one level it makes sense, as the call for papers for the Murphy Institute conference for which this article was written suggests, for “Christian public theology to be realistic—to be based in a clear-headed assessment of facts about God, human beings, and the world”—yet I think one needs to ask seriously whether Christian (or at least Catholic) realism an oxymoron. This raises questions about what is the role of Catholics in the world and what it means to bear faithful witness to the Gospel, which are beyond the scope of my inquiry. For purposes of this discussion, I have worked on the assumption that one can remain true to core Catholic beliefs while still articulating a realist position.¹³¹

All that said, I think the goal of finding common ground on abortion is important enough to justify attempting to see what a Catholic realist perspective might add. I’m not sure how effective a job I’ve done here in trying to answer all the questions I have raised, but I think there is value in laying out a framework of questions that need to be addressed.

131. But I also acknowledge that some would find this a distortion of the Catholic position. As one believer mused, “This all sounds fine and good, except for the fact that it really does not seem consistent with what Jesus expected of his disciples. Reading the Sermon on the Mount, for example, I do not get the impression that Jesus was laying out an impossible ideal for Christian morality, but really and truly telling his followers how to behave. Moreover, Jesus seems to acknowledge that his ethic, while not impossible to live out, will not be an ethics of power, that is, a realist ethic. We see this especially in the reading from *Mark* 8:27-9:1 where Jesus asks the question, ‘Who do men say that I am?’ Peter gives the correct answer, that Jesus is the Messiah, but errs in assuming that Jesus will be a powerful Messiah, indicated by Jesus’ harsh rebuke to ‘Get behind me, Satan. For you are setting your mind not on divine things but on human things.’ As Stanley Hauerwas, one of the most famous Christian advocates of non-violence alive today, writes, ‘Jesus insists it is possible, if God’s rule is acknowledged and trusted, to serve *without* power.’” Is Christian Realism a Non Sequitur? (Mar. 2, 2009), <http://everydaythomist.wordpress.com/2009/03/02/is-christian-realism-a-non-sequitur/>